

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELISS DAN XIN ZHANG,

Plaintiff,

v.

NORTHWEST TRUSTEE SERVICES,
INC. AND F.E.I. LLC,

Defendants.

NO. CV-09-3017-EFS

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS CASE FOR
FAILURE TO STATE A CLAIM,
ENTERING JUDGMENT, AND CLOSING
FILE**

Before the Court, without oral argument, is Defendants Northwest Trustee Services, Inc. (NWTs) and F.E.I. LLC's Motion to Dismiss Case for Failure to State a Claim. (Ct. Rec. [3](#).) Rather than file an opposition to the dismissal motion, Plaintiff Eliss Dan Zin Zhang filed an amended complaint. (Ct. Rec. [11](#).) Because Defendants filed a responsive pleading (the dismissal motion), Plaintiff was required to seek leave to file the amended complaint pursuant to Federal Rule of Civil Procedure 15(a)(2). The Court nevertheless 1) accepts Plaintiff's pro se amended complaint because the amended complaint does not add new claims but rather continues to contend that the trustee's sale was invalid and fraudulent, and 2) applies Defendants' dismissal arguments to the amended complaint. Although Plaintiff did not file an opposition to Defendants' dismissal motion as is required by Local Rule 7.1 and therefore is deemed

1 agreeable to entry of an adverse order,¹ the Court reviews the merits of
2 the dismissal motion below. After reviewing the dismissal motion,
3 complaints, and relevant authority, the Court finds Plaintiff cannot
4 state a cognizable federal legal theory under the alleged facts.
5 Therefore, for the reasons given below, the Court grants Defendants'
6 motion and dismisses the amended complaint.

7 **A. Standard**

8 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)
9 determines whether the plaintiff has pled a cognizable legal theory and
10 sufficient facts to support the cognizable legal theory. *Navarro v.*
11 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). If the complaint alleges a
12 cognizable legal theory, it will not be dismissed if the factual
13 allegations plausibly show that the pleader is entitled to relief. *Bell*
14 *Atl. v. Twombly*, 550 U.S. 544, 557 (2007). Rather, because motions to
15 dismiss are viewed with disfavor and are rarely granted, a complaint
16 stating a cognizable legal theory will be dismissed for failure to state
17 a claim only if the factual allegations do not raise the right to relief
18 above the speculative level. *Id.*; *Hall v. City of Santa Barbara*, 833
19 F.2d 1270 (9th Cir. 1986).

20 In ruling on a Rule 12(b)(6) motion, a court may consider the
21 allegations contained in the pleadings, exhibits attached to the
22 complaint, and matters properly subject to judicial notice. *Broam v.*
23 *Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003); *see also Outdoor Media Group*,

25 ¹ Plaintiff was cautioned about the consequences of failing to file
26 an opposition by the Court's Notice to Pro Se Litigants of the Dismissal
and/or Summary Judgment Rule Requirements. (Ct. Rec. [7.](#))

1 *Inc. v. City of Beaumont*, 506 F.3d 895, 899-900 (9th Cir. 2007). Here,
2 the Court will consider the documents attached to the complaint and the
3 amended complaint, as well as the documents attached to Defendants'
4 dismissal motion because there are no authentication challenges. See
5 *Schwartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The Court
6 construes these matters in the light most favorable to Plaintiff and
7 accepts all material allegations in the amended complaint, as well as any
8 reasonable inferences drawn therefrom. See *Broom*, 320 F.3d 1028. With
9 these requirements in mind, the Court sets forth the following Background
10 section; the Court recognizes, however, that it is missing several
11 documents from these loan transactions.

12 **B. Background**

13 There have been a number of loans obtained in order to finance the
14 purchase of property located at 1012 and 1014 Holbrook Court in Yakima,
15 Washington ("the property"). The Court sets forth the known information
16 relating to three (3) loan transactions; Plaintiff's claims relate to the
17 most recent loan transaction.

18 On March 21, 1996, Plaintiff and her ex-husband obtained a loan from
19 Washington Mutual Bank for the property, giving Washington Mutual Bank
20 a deed of trust on the property. (Ct. Rec. 11 p. 33.) On November 28,
21 2005, a Substitution of Trustee/Deed of Reconveyance was filed with the
22 Yakima County Auditor under file no. 748507. *Id.* It appears this loan
23 was either paid off in full or taken over by Plaintiff's ex-husband
24 following the dissolution. Nevertheless, this loan obligation is not at
25 issue.

26 On October 31, 2005, Plaintiff obtained a loan from Long Beach
Mortgage Company for the property. *Id.* p. 36. Washington Mutual acted

1 as the trustee on the related deed of trust. *Id.* On August 11, 2006,
2 Washington Reconveyance Company was appointed the successor trustee. *Id.*
3 pp. 35 & 36. Also, on this date, a deed of reconveyance was executed
4 because Plaintiff paid the loan in full. *Id.* pp. 11 & 35. A release of
5 lien was also recorded. *Id.* p. 32. This loan obligation is not at
6 issue.

7 On July 25, 2006, Plaintiff obtained a \$225,000 loan for the
8 property from BNC Mortgage, Inc. (BNC). (Ct. Rec. 5 exs. A & B; Ct. Rec.
9 11 ex. C. p. 28.) The Note was secured by a Deed of Trust on the
10 property in favor of BNC. (Ct. Rec. 5 exs. A & B; Ct. Rec. 11 ex. C. p.
11 28.) The Note was later transferred to U.S. Bank National Association
12 ("U.S. Bank") as trustee for BNC Mortgage Loan Trust 2006-2. (Ct. Rec.
13 5 ex. C.) Plaintiff failed to make payments on this loan obligation
14 beginning in September 2007. *Id.* ex. D. On January 7, 2008, Plaintiff
15 was notified by America Serving Company (ASC), a U.S. Bank servicing
16 agent, that she was in default on the loan obligation. *Id.* ex. E. This
17 letter listed the amount owing and the steps for Plaintiff to take to
18 challenge the claimed amount. *Id.* On February 7, 2008, NWTS, on behalf
19 of ASC, sent another Notice of Default listing the amount then owed and
20 warning of the consequences of default. (Ct. Rec. 11 pp. 20 & 21.) On
21 March 26, 2008, U.S. Bank appointed NWTS as the successor trustee under
22 the Deed of Trust.² (Ct. Rec. 5 ex. C.)

23 A trustee's sale was set for fall 2008. This sale was cancelled on
24 October 17, 2008, after Plaintiff contended that NWTS was foreclosing on
25

26 ² The notary incorrectly listed the date of March 10, 2007;
however, the appointment was recorded in Yakima County on March 26, 2008.

1 the wrong loan obligation. (Ct. Rec. 11 p. 17.) On December 19, 2008,
2 an Amended Notice of Trustee's Sale was issued in connection with this
3 July 25, 2006 loan obligation. (Ct. Rec. 1 pp. 4-5.) Defendant F.E.I.
4 LLC was hired by NWTs to provide trustee notices and manage publication
5 of the trustee sale.

6 On February 6, 2009, NWTs sold the property at a non-judicial
7 trustee's sale. (Ct. Rec. 1 pp. 6-8.) On February 18, 2009, a trustee's
8 deed was issued to U.S. Bank as trustee for the BNC Mortgage Loan Trust
9 2006-2. (Ct. Rec. 5. ex. F.)

10 Plaintiff filed this lawsuit on February 10, 2009, asking the Court
11 to declare the trustee's sale invalid. (Ct. Rec. 1.)

12 **C. Authority and Analysis**

13 Plaintiff contends the trustee sale was invalid because BNC is the
14 trustee - not U.S. Bank. BNC was the initial holder of the Note and Deed
15 of Trust. Both the Note and the Deed of Trust, however, advised
16 Plaintiff that the Note and related Deed of Trust could be transferred.
17 (Ct. Rec. 5 ex. A. p. 1 (The Note states ". . . Lender [BNC] may transfer
18 this Note. Lender or anyone who takes this Note by transfer and who is
19 entitled to receive payments under this Note is called the 'Note
20 Holder.'"); Ct. Rec. 5 ex. A p. 12 (The Deed of Trust, filed under
21 Auditor's No. 7521363, states, "The Note or a partial interest in the
22 Note (together with this Security Instrument) can be sold one or more
23 times without prior notice to Borrower. . . .")). Accordingly, BNC's
24 transfer of the Note and accompanying Deed of Trust interest to U.S. Bank
25 National Association, and subsequent reassignment to NWTs as the
26 successor trustee, were proper. NWTs was the trustee at the time of the
February 6, 2009 sale.

1 The deeds of trust were subject to the Deed of Trust Act, RCW 61.24
2 *et seq.* The Deed of Trust Act sets forth the trustee's requirements and
3 borrower's rights in the event a default is claimed. RCW 61.24.090 &
4 61.24.130. Because Plaintiff received notice of the right to challenge
5 the trustee's sale and failed to bring a court action until after the
6 trustee's sale, she waived any objection to the trustee's sale. See
7 *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163 (2008).
8 Accordingly, Plaintiff fails to state a cognizable federal legal theory
9 upon which relief can be granted. The Court finds leave to amend need
10 not be given.

11 **D. Conclusion**

12 For the reasons give above, **IT IS HEREBY ORDERED:**

13 1. Defendants' Motion to Dismiss Case for Failure to State a Claim
14 **(Ct. Rec. 3)** is **GRANTED**.

15 2. **Judgment** is to be entered in Defendants' favor without
16 prejudice.

17 3. This file shall be **CLOSED**.

18 **IT IS SO ORDERED.** The District Court Executive is directed to enter
19 this Order and provide a copy to Plaintiff and counsel.

20 **DATED** this 4th day of May 2009.

21
22 S/ Edward F. Shea
EDWARD F. SHEA
23 United States District Judge

24 Q:\Civil\2009\3017.dismiss.wpd
25
26